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IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1978
NO. 78-1617

****

BAY MEDICAL CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

****

C.

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
NO. 1. THE DECISION BELOW ERRONEOUSLY UPHELD THE BOARD'S RELIANCE UPON PREVIOUS BARGAINING HISTORY WHICH AROSE UNDER STATE LAW IN FASHIONING THE BARGAINING UNIT	7
NO. 2. THE COURT BELOW IMPROPERLY DISTINGUISHED FOUR DECISIONS OF THREE OTHER UNITED STATES CIRCUIT COURTS OF APPEAL RELIED UPON BY PETITIONER TO SUPPORT ITS CONTENTION THAT THE BOARD ABUSED ITS DISCRETION IN THIS CASE	8
NO. 3. A UNIFORM FEDERAL POLICY AS TO BARGAINING UNITS IN THE HEALTH CARE INDUSTRY CANNOT BE ACHIEVED IF THE BOARD CONTINUES ITS PRESENT POLICY OF FASHIONING BARGAINING UNITS	11

TABLE OF CONTENTS (CONT'D)

Page

NO. 4. THE BOARD SHOULD HAVE BEEN REQUIRED BY THE COURT BELOW TO CARRY OUT ITS STATUTORY DUTY TO DEFINE THE TECHNICAL EMPLOYEES TO BE INCLUDED IN THE UNIT AS REQUESTED BY ALL PARTIES TO THE PROCEEDINGS AND IN CONFORMANCE WITH ITS OWN REGULAR PRACTICE IN OTHER UNIT CASES 11

Conclusion 13

Appendix 15

TABLE OF AUTHORITIES CITED

Cases

Page

Alexian Brothers of Elizabeth, Inc., and District 1199, 219 NLRB No. 179 (1975) ... 11

Clarion Osteopathic Community Hospital and District 1199P, 219 NLRB No. 41, July 18, 1975 11

Illinois Extended Care Convalescent Center, 220 NLRB No. 167 (1975) 11

Long Island College Hospital v NLRB, 566 Fed 2d 833 (Second Circuit), cert denied — US — 98 S.Ct. 1647..... 9

Marquette General Hospital, 218 NLRB No. 105 (1975) 11

Medical Arts Hospital of Houston, Inc. and Teamsters Freight Tank Line and Automobile Industry Employees, Local 98, 221 NLRB No. 170, December 4, 1975 12

Memorial Hospital of Roxborough v NLRB, 545 Fed 2d 351 (Third Circuit, 1976)..... 9

Nathan and Miriam Barnert Memorial Hospital, 217 NLRB No. 132 (May 5, 1975) 6

NLRB v Metropolitan Life Insurance Company, 380 US at 442-43 13

NLRB v West Suburban Hospital, 570 Fed 2d 213, 216 (Seventh Circuit, 1978)..... 9

TABLE OF AUTHORITIES CITED (CONT'D)

Cases (Cont'd)

	Page
North Memorial Medical Center, 224 NLRB No. 28 (1976)	8
St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc., 217 NLRB No. 133 (May 5, 1975)	6
St. Elizabeth's Hospital of Boston and District 1199, 220 NLRB No. 61, September 15, 1975	11
St. Vincent's Hospital v NLRB, 567 Fed 2d 588 (Third Circuit, 1977)	10
Taylor Hospital, 218 NLRB No. 179 (1975)	11
The Mason Clinic and Seattle Chapter No. 4, 221 NLRB No. 66, November 6, 1975	12
Trinity Memorial Hospital of Cudahy, Inc. and Union of Hospital and Health Care Employees, 219 NLRB No. 63, July 17, 1975	11

Statutes

28 USC §1254(1)	2
29 USC §151 et seq	3
Public Law 93-360 (S. 3203) (effective Aug. 25, 1974)	5

IN THE
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BAY MEDICAL CENTER,

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Bay Medical Center, Inc., in Bay City, Michigan, (hereinafter referred to as the "Employer" or the "Medical Center") respectfully prays that a Writ of Certiorari issue to review the final Judgment and Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 23, 1979.

OPINIONS BELOW

The December 28, 1978 Opinion of the United States Court of Appeals for the Sixth Circuit is reported at _____ Fed 2d _____ and is reproduced in the Appendix attached hereto at pp. 17-23. The resulting Judgment of the Court issued January 23, 1979, is similarly attached hereto at p. 24 in this Appendix. A copy of the Order of the United States Court of Appeals for the Sixth Circuit staying its mandate is also included in the Appendix, at p. 25.

The June 18, 1975 Decision, Order and Direction of Election of the National Labor Relations Board ("Board") is reported at 218 NLRB No. 100 and is reproduced in the Appendix at pp. 26-39. The Decision and Order of the Board dated May 24, 1976 is reported at 224 NLRB No. 14 and is reproduced in the Appendix at pp. 40-50.

Notice of Appeal and Proof of Filing and Service are contained in the Appendix at pp. 63-65.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was dated and entered on January 23, 1979 granting enforcement of the Board's May 24, 1976 Order. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

1. Did the Board, by failing to include the Licensed Practical Nurses (herein referred to as LPNs) in a bargaining unit of technical employees, abuse its discretion

and improperly rely upon bargaining history created under state law, thus violating the congressional admonition to avoid undue proliferation of bargaining units in the health care industry?

2. Was the Board's bargaining unit determination contrary to its own previously announced policies ordained in its guideline unit decisions for the health care industry, as well as many decisions which later followed?

3. Did the Board fail in its Decision to properly define the technical employees to be included in the bargaining unit, despite request for such clarification and definition by all parties to the case?

4. Was the Board's unit determination supported by evidence contained in the record?

STATUTORY PROVISIONS INVOLVED

The applicable provisions of the National Labor Relations Act, as amended (29 USC §151 et seq.) ("Act"), are set forth in the Appendix at pp. 53-62.

STATEMENT OF THE CASE

Petitioner, a medical center, is a non-profit, 350 bed, general hospital engaged in the provision of health care services, which employs approximately 1,200 persons. Prior to March, 1977, when it occupied a newly constructed hospital building in Bay City, Michigan, this medical center had operated two separate divisions, Mercy Memorial Division and General Division, those buildings being approximately 1½ miles apart. At the time the Board proceedings were being heard, and the Board's

Decisions being issued, the two separate physical facilities were in existence, however, the operation, administration and overall management were centrally organized.

The Medical Center's General Division had a prior, State authorized bargaining history with the Catering Industry, Hospital Workers and Bartenders Union, Local 688 (Local 688). This Union covered maintenance and service employees at the General Division.

For some years prior to the occupancy of the new facility in March, 1977, the General Division had a State authorized bargaining history with the General Division Registered Nurses Staff Council representing Registered Nurses at the General Division, as well as with the General Division Licensed Practical Nurses Council, affiliated with the Michigan Licensed Practical Nurses Association.

In September, 1974, Local No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Inc. (hereinafter referred to as Local No. 486 or "Teamsters") filed Petitions with the Regional Director of the Board seeking to represent a bargaining unit consisting of technical employees at the Mercy Memorial Division and the General Division (two separate facilities) or, alternatively, one overall unit of technical employees at both divisions of the Medical Center.[1]

A hearing was held in November, 1974, on Local No. 486 Petitions and Local 79 of the Hospital Employees Division, Service Employees International Union (Local

[1] In Case No. 7-RC-12740, Local No. 486 sought a separate unit of housekeepers, janitors and linen maids at the Mercy Division only. This Petition was dismissed by the Board, 218 NLRB No. 100. (A. 20)

79), and Local 688 of the Catering Industry, Hospital Workers and Bartenders Union, (Local 688) intervened in the various petitions at the hearing.

At the Board's hearing the position of the Medical Center was that the Petitions should be dismissed because the unit sought would result in fragmentation of the work force as well as proliferation of the bargaining units, contrary to the congressional mandate to avoid undue proliferation of bargaining units in the health care industry.[2]

After the case was transferred by the Regional Director to the Board in Washington, on June 8, 1975, in 218 NLRB No. 100, the Board issued its Decision and Direction of Election. A 3-member majority of the Board held that a unit consisting of "all technical employees employed by the Employer at its Mercy and General Divisions, Bay City, Michigan; but excluding all other employees, guards, and supervisors as defined in the Act would be appropriate." Further, the Board stated that "while a majority of the Board still adheres to the view that LPNs properly belong in a unit with other technical employees, it is not wedded to it that it would blindly require the inclusion of LPNs in every situation in which a unit of technical employees is sought." As a result, the Board majority excluded LPNs from the technical unit.

Board members Kennedy and Penello dissented and would have dismissed the Petition. They stated that "by failing to include the LPNs, our colleagues appear to be departing from their majority position, as stated in

[2] Public Law 93-360 (S. 3203) (effective August 25, 1974) amended the National Labor Relations Act to extend the Act's coverage to and Labor Board jurisdiction over non-profit health care institutions, which previously had been statutorily exempted.

Barnert[3] and in **St. Catherine's Hospital**[4] wherein it was held that technical employee units must include LPNs."

In July of 1975, the Petitioning Union, Local 486, together with Intervenor Union, Local 79 and the Employer, all petitioned the Board for clarification of its Decision, as it related to the definition of technical employees. The Board denied all requests for further clarification.

Following further Board proceedings, and the conduct of a representation election among the technical employees, the Board overruled all objections raised by the Medical Center, certified Local 486 as the certified representative of the employees in the technical unit exclusive of LPNs and ultimately found the Employer guilty of failing to bargain with Local 486. The Medical Center appealed from this Order and asked for review from the United States Court of Appeals for the Sixth Circuit.

The Court, in its December 28, 1978 Opinion, did not deal with the Board's failure to define the technical employees included in the bargaining unit nor with the question of whether or not its unit determination was supported by the evidence contained in the record. The Court chose only to deal with the question of whether or not the Board had reasonably exercised its discretion in determining the appropriateness of the technical bargaining unit at the Medical Center. The Court found no abuse of the Board's discretion and attempted, in its Opinion, to distinguish other recent hospital bargaining unit decisions issued by other United States Courts of Appeal.

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[3] **Nathan and Miriam Barnert Memorial Hospital**, 217 NLRB No. 132 (May 5, 1975).

[4] **St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.**, 217 NLRB No. 133 (May 5, 1975).

REASONS FOR GRANTING THE WRIT

NO. 1. THE DECISION BELOW ERRONEOUSLY UPHELD THE BOARD'S RELIANCE UPON PREVIOUS BARGAINING HISTORY WHICH AROSE UNDER STATE LAW IN FASHIONING THE BARGAINING UNIT.

If Congress was willing to dispense with entire state statutes, when it passed the health care amendments, as well as their administrative and procedural practices, the Board should be compelled to allow for the revision of the collective bargaining units which predated the Federal Act and which are contrary to congressional intent. As evidenced herein, however, the Board has erroneously chosen to place its imprimatur on such pre-existing units, even when they are acknowledged to have been inconsistent with its own May 5, 1975 guideline decisions. Thus, the Board held:

> "In the instant case, the record indicates an established bargaining history among the LPNs at General who are currently represented for collective bargaining purposes by intervenor MLPNA, which has a co tract with the Employer that will not expire until February 1, 1977. We do not desire to upset the stability inherent in that bargaining relationship by disenfranchising the LPNs at General and including them in the above technical unit. Nor do we think it proper to include in the above technical unit the LPNs at Mercy who are currently unrepresented. Such a finding would have the anomalous effect of fractionalizing the representation of the LPNs employed by the Employer, a state of affairs which we are congressionally mandated to avoid."

It appears to the Petitioner that the real anomaly that results from the Board's Decision is that while the Michigan State Statute has been supplanted by a uniform Federal Act, the Board is none the less willing to adhere to bargaining unit history which arose under the displaced state statute. In this case, the fact is that the Board's adherence to the pre-existing bargaining history caused the Board to split up the technical unit and at that time disenfranchise the unrepresented Mercy Division LPNs.

It thus becomes clear that the Board, and in turn the Court below, placed undue emphasis on collective bargaining history which arose under Michigan's State Law which has since been superseded by a Uniform Federal Policy.[5]

NO. 2. THE COURT BELOW IMPROPERLY DISTINGUISHED FOUR DECISIONS OF THREE OTHER UNITED STATES CIRCUIT COURTS OF APPEAL RELIED UPON BY PETITIONER TO SUPPORT ITS CONTENTION THAT THE BOARD ABUSED ITS DISCRETION IN THIS CASE.

The Court below at page 7 of its Decision attempted to distinguish certain bargaining unit cases decided by the

[5] In **North Memorial Medical Center**, 224 NLRB No. 28 (1976), under similar circumstances, the Board dismissed a petition for emergency medical technicians who for 14 years had been represented in a unit by themselves under Minnesota law.

"The Regional Director's reliance on the bargaining history to support his contrary finding is misplaced. For while bargaining history is relevant in determining the appropriateness of a unit, it is not the sole factor. Under the circumstances herein, we find it is not controlling.

"We note at the outset that the bargaining history in this case took place under the Minnesota statute which permitted the formation of fragmented units such as the one sought herein. This is in sharp contrast with the principal thrust of the legislative history of the health care amendments of the Act, admonishing the Board to avoid under proliferation of bargaining units in the health care industry." 92 LRRM at 1214.

Second, Third and Seventh Circuit Courts of Appeal. In **Memorial Hospital of Roxborough v NLRB**, 545 Fed 2d 351 (Third Circuit, 1976), and **Long Island College Hospital v NLRB**, 566 Fed 2d 833 (Second Circuit, 1977), cert denied — US — 98 S.Ct. 1647, the Courts reversed the Board's Decisions stating that the Board extended "comity" to findings made by State Labor Boards and thus made no independent determination of the appropriateness of the bargaining units in the light of Congress' directive to avoid undue proliferation.[6] Petitioner submits that faulty reliance upon bargaining history created under state laws and through state agency proceedings, prior to the health care amendments to the Act, is the same thing as relying upon "comity" to findings made by Labor Boards and thus there has been no independent determination of the appropriateness which will stand in the light of the health care amendments in this case.

In **NLRB v West Suburban Hospital**, 570 Fed 2d 213, 216 (Seventh Circuit, 1978), the Seventh Circuit determined that the Board has given "mere lip-service mention of the congressional admonition as a factor to be taken into account without any indication ... as to the manner in

[6] In the **Long Island College Hospital** case the Court said at page 844:

"With its (NLRB) own opinions in such disarray, it was peculiarly inappropriate for the Board to avoid a decision here by deferring to the dated certification of a state agency when there was at least some risk that the difference in the state statute might have affected the state agency's ruling — even if we were to assume, contrary to the majority opinion in **Roxborough**, supra, 545 Fed 2d 351, that in some cases this might be permissible.

As was said in **LaCrosse Telephone Corp. v Wisconsin Employment Relations Board**, 336 US 18, 26, 69 S. Ct. 379, 383, 93 L. Ed. 463: 'A certification by a State Board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the Federal Act as if the orders of the two Boards made a head-on collision.'"

which its unit determination ... implemented or reflected that admonition.'"[7] Petitioner submits that the Court below similarly gave lip-service to its statutory obligation avoiding undue proliferation of bargaining units in the health care field, and relied entirely upon prior bargaining history arising prior to the 1976 amendments.

In **St. Vincent's Hospital v NLRB,** 567 Fed 2d 588 (Third Circuit, 1977) the Court reversed the Board for failing to consider special problems of the health care industry in arriving at its bargaining unit appropriateness. At page 592 of the Decision, the Court, after pointing out that the Board seemingly was impressed by the fact that the boiler operators at St. Vincent's Hospital were licensed by the state and had little interchange with other employees, held it was improper for the Board to apply traditional standards which recognize that licensed boilermen may constitute a separate appropriate unit. The Court added: "The legislative history of the health care amendments, however, makes it quite clear that Congress directed the Board to apply a standard in this field that was not traditional. Proliferation of units in industrial settings has not been the subject of congressional attention but fragmentation in the

[7] At page 214 the Court said:

"The determination of an appropriate unit for collective bargaining purposes is committed to the informed discretion of the Board. **Packard Motor Car Company v NLRB,** 330 US 485 (1947). But the Board's discretionary powers with respect to unit determinations are not without limits, and if the Board's decision oversteps the law, enforcement must be denied. The Board's determination that West Suburban's maintenance department constitutes an appropriate bargaining unit must be viewed against the backdrop of the legislative history of the 1974 amendments of the Act."

And at the very conclusion of its opinion in the last paragraph the Court said:

"We add our observation that the Board apparently has embarked upon an erratic course in making bargaining unit determinations. Fixing a course with guidance from the congressional directive of preventing proliferation of collective bargaining units in the health care field ought to alleviate this deficiency."

health care field has aroused legislative apprehension. The Board therefore should recognize that the contours of a bargaining unit in other industries do not follow the blueprint Congress desired in a hospital." In its concluding paragraph, the Court added: "In certifying a unit of boiler operators only, the Board did not heed the congressional admonition nor follow its own cases which had observed the directive. Consequently, its order will not be enforced. The Hospital's petition to review and set aside the Board's order will be granted. The Board's cross application for enforcement will be denied."

NO. 3. A UNIFORM FEDERAL POLICY AS TO BARGAINING UNITS IN THE HEALTH CARE INDUSTRY CANNOT BE ACHIEVED IF THE BOARD CONTINUES ITS PRESENT POLICY OF FASHIONING BARGAINING UNITS.

The Board has not only erroneously relied upon prior bargaining history, but has issued so-called "guideline" decisions as to LPN bargaining units[8] and then in a hit and miss fashion fails to follow them and creates exception after exception.

NO. 4. THE BOARD SHOULD HAVE BEEN REQUIRED BY THE COURT BELOW TO CARRY OUT ITS STATUTORY DUTY TO DEFINE THE TECHNICAL EMPLOYEES TO BE INCLUDED IN THE UNIT AS REQUESTED BY ALL PARTIES TO

[8] **Nathan and Miriam Barnert Memorial Hospital Association,** supra; **St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.,** supra; **Trinity Memorial Hospital of Cudahy, Inc. and Local 1199W,** 219 NLRB No. 63 (1975); **Clarion Osteopathic Community Hospital and District 1199P,** 219 NLRB No. 41 (1975); **Taylor Hospital,** 218 NLRB No. 179 (1975); **Marquette General Hospital,** 218 NLRB No. 105 (1975); **St. Elizabeth's Hospital,** 220 NLRB No. 61 (1975); **Illinois Extended Care Convalescent Center,** 220 NLRB No. 167 (1975); **Alexian Brothers of Elizabeth Inc., and District 1199,** 219 NLRB No. 179 (1975).

THE PROCEEDINGS AND IN CONFORMANCE WITH ITS OWN REGULAR PRACTICE IN OTHER UNIT CASES.

The Board set forth a definition of the bargaining unit in this case in its June 18, 1975 Decision which was ambiguous and unsupported by the record.[9]

In any number of cases decided by the Board in the health care industry, the Board analyzed the evidence from the record as it related to various technical classifications.[10] In those decisions it specifically described the various positions and classifications which from the record it considered technical and which should be included in the unit under consideration. This the Board totally failed to do in the instant case although requested to do so by two of the unions involved in the proceedings as well as the Employer.

By simply resting its decision upon past bargaining history under state law and by defining "technical employees" in terms of education which conclusions were not supported by the evidence contained in the record,

[9] "The record establishes that technical employees employed at Mercy and General worked exclusively in their respective departments and have little or no contact with other hospital employees. All technical employees are separately supervised by fellow technicians and all have had 2 or 3 years of specialized training in a junior college or university and a year of in-service training at a hospital. Their work consists of performing highly specialized technical tests and procedures to obtain information used by doctors in connection with the care and treatment of patients. Although some technical employees have obtained certification from various private associations, there is no state licensing requirement for technicians, and all technical employees, regardless of certification, perform identical work."

[10] **Trinity Memorial Hospital of Cudahy, Inc. and Union of Hospital and Health Care Employees,** supra; **Clarion Osteopathic Community Hospital and District 1199P,** supra; **St. Elizabeth's Hospital of Boston and District 1199,** supra; **The Mason Clinic and Seattle Chapter No. 4,** 221 NLRB No. 66, November 6, 1975; **Medical Arts Hospital of Houston, Inc. and Teamsters Freight Tank Line and Automobile Industry Employees, Local 98,** 221 NLRB No. 170, December 4, 1975.

the Board failed to perform its duty, failed to enunciate a unit which the parties could follow, and failed to articulate the basis on which a reviewing court can perform its function.[11]

CONCLUSION

The issue of appropriate bargaining units and the number thereof which should be permitted in the health care industry is one of singular importance in the adminstration of the National Labor Laws. The Board's holding and that of the Court below highlights several of the significant aspects of this issue. Those decisions are clearly at odds with the congressional purpose of recognizing the special needs for careful fashioning of bargaining units in the health care institutions involved in the application of the Act. The Board's decision and that of the Court represent a failure to follow the congressional admonition against proliferation of bargaining units and improperly distinguishes other United States Circuit Courts of Appeals' decisions in this area. Finally, both decisions fail to hold the Board to its statutory obligation of clearly defining bargaining units and basing them upon the evidence contained in the record.

Petitioner prays that a Writ of Certiorari be granted to review the Judgment and Order of the United States Court of Appeals for the Sixth Circuit for the reasons contained herein.

[11] **NLRB v Metropolitan Life Insurance Company,** 380 US at 442-43; **Memorial Hospital of Roxborough v NLRB, supra.**

Dated: April _____, 1979.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
December 28, 1978 Decision of United States Court of Appeals for the Sixth Circuit	17
United States Court of Appeals for the Sixth Circuit Order issued as Mandate January 23, 1979	24
United States Court of Appeals for the Sixth Circuit Order Staying Mandate dated February 13, 1979	25
National Labor Relations Board Decision — 218 NLRB No. 100 dated June 18, 1975	26
National Labor Relations Board Decision and Order — 224 NLRB No. 14 dated May 24, 1976	40
Relevant provisions of the National Labor Relations Act as amended	53
Notice of Appeal	63
Proof of Service of Notice of Appeal	65

No. 76-1881

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MEDICAL CENTER, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Appeal from the National Labor Relations Board.

Decided and Filed December 28, 1978.

Before: Phillips, Chief Judge; Merritt, Circuit Judge; Ballantine,* District Judge.

Merritt, Circuit Judge. In 1974 Congress amended the National Labor Relations Act to bring non-profit hospitals like the petitioner, Bay Medical Center, within the statutory jurisdiction of the National Labor Relations Board.[1] The purpose of the amendment was to give hospital employees the "coverage and protections" of the National Labor Relations Act.[2]

The question in this case is whether the Board abused its discretion when it determined that a bargaining unit of "technical employees" at the Medical Center was appropriate under section 9(b) of the Act, even though it did

* The Honorable Thomas Ballantine, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

[1] Pub. Law 93-360, 88 Stat. 395, *amending* 29 U.S.C. §§ 151-68 (1976).

[2] See S. Rep. No. 93-766, 93d Cong., 2d Sess. 3 (1974); 2 U.S. Code Cong. & Admin. News 3946, 3948 (1974).

not include licensed practical nurses (LPN's).[3] We hold that the Board's decision was a reasonable exercise of its discretion to determine the appropriateness of bargaining units.

I

In 1972, two Bay City, Michigan, hospitals, the Sisters of Mercy Hospital and the General Hospital, merged and became the Bay Medical Center. The Medical Center has operated each facility as a separate division of a single non-profit corporation.[4]

In the fall of 1974, the Teamsters Union, Local 486, petitioned the Board, seeking to represent two separate bargaining units of technical employees at both the Mercy and General divisions of the Medical Center, or, alternatively, to represent a combined unit of the same technical employees.

With members Kennedy and Penello dissenting, the Board, on June 18, 1975, determined that a combined unit of technical employees at both Mercy and General was appropriate and accordingly directed an election. The Board concluded, however, that it would not be appropriate to include LPN's in the unit. 218 N.L.R.B. 620 (1975). It admittedly departed from its policy of including LPN's in technical employee units. The Board based this conclusion on a finding that the LPN's at General were already

[3] NLRA § 9(b), 29 U.S.C. § 159(b), empowers the Board to "decide in each case whether, in order to secure the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Determinations under this section involve "of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).

[4] In 1974 the Michigan Department of Public Health found that the facilities at both Mercy and General were inadequate and ordered the Medical Center to build new facilities. The Center undertook construction of a single new hospital building to house the combined operations of Mercy and General. The project was scheduled for completion in 1977.

represented by a union and were under an existing labor agreement with the Medical Center:

> While a majority of the Board still adheres to the view that LNP's properly belong in a unit with other technical employees, it is not so wedded to it that it will blindly require the inclusion of LPN's in every situation in which a unit of technical employees is sought. Exception will be made where circumstances warrant it. The instant case, in our view, qualifies as such an exception. Thus, we find, for the reasons set forth below, that in this case it would be error to include LNP's in the technical unit found appropriate above.
>
> . . .
>
> In the instant case, the record indicates an established bargaining history among the LPN's at General who are currently represented for collective-bargaining purposes by [the Michigan Licensed Practical Nurses Association], which has a contract with the Employer that will not expire until February 1, 1977. We do not desire to upset the stability inherent in that bargaining relationship by disenfranchising the LPN's at General and including them in the above technical unit. Nor do we think it proper to include in the above technical unit the LPN's at Mercy who are currently unrepresented. Such a finding would have the anomalous effect of fractionalizing the representation of the LPN's employed by the Employer, a state of affairs which we are congressionally mandated to avoid. (However, we wish to reiterate that our exclusion of LPN's from this technical unit is restricted to the facts of this particular case.)

218 N.L.R.B. at 621.

An election was conducted a month later and the Union won a majority of votes. The Medical Center filed objections on the ground that the Board's determination of the technical employee unit absent LPN's was inappropriate. The Hearing Officer recommended that the Medical Center's objection be overruled and that the Regional Director issue

the appropriate union certification. The Regional Director dismissed the Medical Center's exceptions and certified the Union as the technical unit's bargaining representative. On November 11, 1975, the NLRB denied review of the Regional Director's certification.

After certification, the Union filed charges that the Medical Center was refusing to bargain in violation of NLRA §§ 8(a)(5) and (1), 29 U.S.C. § 158(a)(5) and (1). The Medical Center admitted the refusal to bargain but denied that it constituted an unfair labor practice. The Medical Center contended that the Board's determination of a technical employee unit which did not include LPN's was an abuse of the Board's discretion. The Board granted summary judgment to the Union and ordered the Medical Center to bargain. 224 N.L.R.B. 69 (1976). The case comes to this Court on the Medical Center's petition for review and on the NLRB's cross-petition for enforcement of the bargaining order.

II

Congress acknowledged the potential for damage to the nation's health care that might attend disruptive labor relations in the hospital industry when it extended the benefits of the NLRA to non-profit hospital employees. Congress feared that jurisdictional disputes and strikes for recognition could compromise patient care, the consequences of which would be "far more serious . . . than a break in an industrial plant's production."[5] Congress was also apprehensive lest union activity lead to increased medical costs:

[5] St. Vincent's Hospital v. NLRB, 567 F.2d 588, 590 (3d Cir. 1977). *See also* S. Rep. No. 93-766, 93d Cong., 2d Sess. 3 (1974), 2 U.S. Code Cong. & Admin. News at 3948 (1974); Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act*, 70 NW. L. Rev. 202, 215-16 (1975).

> In analyzing the issue of bargaining units, the Board should also consider the issue of the cost of medical care. Undue unit proliferation must not be permitted to create wage "leapfrogging" and "whipsawing."[6]

To guard against these evils, Congress instructed that "[d]ue consideration . . . be given by the Board to preventing proliferation of bargaining units in the health care industry."[7]

The Medical Center argues that this congressional directive against undue proliferation limits the Board's traditionally broad discretion to determine what bargaining units are appropriate.[8] The Medical Center further contends that the Board's decision not to include LPN's in the technical employee unit was an abuse of this circumscribed discretion.

It is settled that the Board must "disclose the basis of its order" and "give a clear indication that it has exercised the discretion with which Congress has empowered it" when exercising its discretion to determine the appropriateness of bargaining units. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941). When the Board departs from its usual policies, "it is essential that the 'reasons for the decisions in and distinctions among these cases' be set forth to dispel any appearance of arbitrariness." *Memorial Hospital of Roxborough* v. *NLRB*, 545 F.2d 351 (3d Cir. 1976), *quoting NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965).

Here, the Board was required to reconcile the policy against undue unit proliferation in the health care industry with the policy against disruption of existing, harmonious, bargaining relationships. The Board distinguished its earlier decisions[9] in which LPN's were included in technical units on the ground that in none of the earlier

[6] 120 Cong. Rec. S. 6940-41 (May 2, 1974) (remarks of Sen. Taft).

[7] S. Rep. No. 93-766, 93d Cong. 2d Sess. 3 (1974).

[8] *See* note 2 *supra*.

[9] St. Catherine's Hospital, Inc. 217 N.L.R.B. 787 (1975); Barnert Memorial Hospital Center, 217 N.L.R.B. 775 (1975).

cases did there exist a prior collective bargaining relationship between LNP's and the hosptal.

The Medical Center argues, however, that the Board's reluctance to interfere with an existing bargaining relationship is not reason enough to justify deviation from its established policy. We do not accept this position. It would, in effect, establish a general rule that LPN's *must* be included in technical units. We refuse to deprive the Board of the flexibility it needs to fashion bargaining units to fit peculiar fact situations.

Courts have long recognized that the Board may take bargaining history into account when determining whether a proposed bargaining unit is appropriate.[10] Congress also recognized that bargaining history should continue to be a relevant concern in the health care field. When the 1974 amendments were debated on the Senate floor, Senator Williams, chairman of the committee that drafted the amendment, stated:

> . . . The National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, *particularly where there is such a history* in the area . . .
>
> While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest

[10] Libby-Owens Ford Co. v. NLRB, 495 F.2d 1195, 1200 (3d Cir.), *cert. denied* 419 U.S. 998 (1974); NLRB v. Zayre Corp., 424 F.2d 1159, 1165 (5th Cir. 1970); American Bread Co. v. NLRB, 411 F.2d 147, 153 (6th Cir. 1969); NLRB v. Porter County Farm Bureau, 314 F.2d 133, 136 (2d Cir. 1963).

> from exercising its specialized experience and expert knowledge in determining the appropriate bargaining units.

120 Cong. Rec. § 12104 (July 10, 1974) [emphasis added].

None of the recent decisions from other circuits relied on by the Medical Center supports its contention that the NLRB has abused its discretion in this case. In *Memorial Hospital of Roxborough* v. *NLRB,* 545 F.2d 351 (3d Cir. 1976), and *Long Island College Hospital* v. *NLRB,* 566 F.2d 833 (2d Cir. 1977), *cert. denied* ____ U.S. ____, 98 S. Ct. 1647, the courts reversed because the Board extended "comity" to findings made by state labor boards and thus made no independent determination of the appropriateness of the bargaining units in light of Congress' directive to avoid undue proliferation. In *St. Vincent's Hospital* v. *NLRB,* 567 F.2d 588 (3d Cir. 1977), the Board applied a standard for determining appropriateness developed for other industries without giving any consideration to the special problems of the health care industry. In *NLRB* v. *West Suburban Hospital,* 570 F.2d 213, 216 (7th Cir. 1978), the Seventh Circuit determined that the Board had given "mere lip-service mention of the Congressional admonition as a factor to be taken into account, without any indication . . . as to the manner in which its unit determination . . . implemented or reflected that admonition."

Here, the NLRB's determination not to include LPN's in a bargaining unit of technical employees was a considered decision in which the Board balanced the policy against undue proliferation of bargaining units with the policy against disrupting existing bargaining relationships. This was the correct standard, and there was a rational basis for the decision. Accordingly, we affirm the Board's decision that the Medical Center's refusal to bargain is violative of NLRA §§ 8(a)(1) and (5) and hereby order enforcement of the Board's bargaining order.

No. 76-1881

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MEDICAL CENTER, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

FILED
DEC. 28, 1978
John P. Hehman,
Clerk

O R D E R

Before: PHILLIPS, Chief Judge; MERRITT, Circuit Judge; BALLANTINE, District Judge.

On petition to review an order of the National Labor Relations Board,

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the National Labor Relations Board be and it is hereby enforced.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

ISSUED AS MANDATE: January 23, 1979
COSTS: (To be awarded to respondent)

Printing.....$191.08
TOTAL.....$191.08

A TRUE COPY
Present:
JOHN P. HEHMAN, Clerk
By /s/ Dorothy J. Phelan
Deputy Clerk

No. 76-1881

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MEDICAL CENTER, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

FILED
FEB. 13, 1979
John P. Hehman,
Clerk

O R D E R

Upon consideration of the motion of the petitioner for stay of mandate of this Court,

It is ORDERED that the mandate be and it hereby is recalled and stayed pending petition for a writ of certiorari to the Supreme Court.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

MFJKP
D-15
Bay City, Mich.

218 NLRB No. 100

United States of America
Before the National Labor Relations Board

Bay Medical Center, Inc.,
Employer,

and

Local 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Ind.,
Petitioner.[1]

Cases 7-RC-12687, 7-RC-12734, and 7-RC-12740.

[1] Hospital Employees' Division, Service Employees International Union, Local 79, AFL-CIO (hereinafter referred to as Local 79); Catering Industry, Hospital Workers and Bartenders Union, Local 688, AFL-CIO (hereinafter referred to as Local 688); and Michigan Licensed Practical Nurses Association (hereinafter referred to as MLPNA) were granted intervention with respect to various of the petitions, on the basis of sufficient showing of interest.

DECISION, ORDER, AND DIRECTION OF ELECTION

(Dated June 18, 1975)

Upon petitions duly filed pursuant to Section 9(c) of the National Labor Relations Act, as amended, a hearing in these consolidated cases was held before Hearing Officer Charles F. Morris of the National Labor Relations Board. Following the close of the hearing, the Regional Director for Region 7 transferred these consolidated cases to the Board for decision. Thereafter, the Employer, the Petitioner, and the Intervenors filed briefs.

The Board has reviewed the Hearing Officer's ruling made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record of this proceeding, including the briefs filed herein, the Board finds:

1. The parties stipulated that the Employer is a nonprofit corporation engaged in the operation of hospitals in Bay City, Michigan. During the calendar year preceding the hearing, the Employer received gross revenues in excess of $500,000 and during the same period it purchased in excess of $20,000 in goods and supplies from concerns located outside the State of Michigan. Accordingly, in view of the Employer's substantial effect on commerce, we find that it is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. Since July 1972, the Employer has operated two hospitals, Mercy and General, located approximately 1½ miles apart. Prior to July 1972, Mercy was a nonprofit corporation operated by the Sisters of Mercy and General was a nonprofit corporation operated by a private board of trustees. The State refused to relicense either Mercy or General because their buildings were too old. Therefore, in July 1972, the Employer acquired both hospitals, merged them into a single corporation, and was granted a single operating license by the State. A condition of the license is that the Employer erect a new building to house the complete operations of Mercy and General by 1977. Planning for such a facility began in September 1974. Architect's plans were drawn and approved and financing has been arranged. Ground breaking is scheduled for June 1975.

The Employer administers the operations of its Mercy and General "divisions" from a central administrative office, Corporate affairs are managed by a president, vice president, and board of trustees. Operationally, an administrator and a personnel and labor relations manager establish and administer common personnel and labor relations policies for all employees. Thus, all employees at Mercy and General share common wage scales, fringe benefit programs, job classifications, duties, working conditions, and rules, all of which are set forth in an employee manual.

While most employees are hired for a particular hospital, some hiring is done centrally, with subsequent assignment to either Mercy or General, and all hiring policies and procedures are established centrally. Job openings at both hospitals are open to bidding by employees at both, and the record contains evidence that an undisclosed number of full-time employees at each hospital work as part-time employees at the other hospital. In addition, the record establishes a degree of employee interchange in the nursing, X-ray, maintenance, and dietary

departments at both hospitals and the merger of several medical service departments.[2]

The Employer has executed collective-bargaining agreements with several unions, none of which has been certified by the Board. These unions have represented various segments of employees at General since at least July 1972, and continue to represent them at the present time. Thus, the Employer has collective-bargaining agreements with Intervenor MLPNA covering all LPN's at General, which runs from March 1, 1974, to February 28, 1977; with Intervenor Local 688 covering all housekeeping, maintenance, and dietary employees, nurses aides, ward secretaries, and orderlies employed at General, which runs from March 8, 1974, to January 1, 1977; and with Michigan Nurses Association covering all registered nurses at General, which runs from March 1, 1974, to December 31, 1976.

In Cases 7—RC—12687 and 7—RC—12734, the Petitioner has filed petitions seeking to represent separate units of technical employees at Mercy and General who are presently unrepresented for collective-bargaining purposes. Alternatively, the Petitioner has expressed a willingness to represent a single overall unit of technical employees at both hospitals. In Case 7—RC—12740, the Petitioner seeks to represent a unit of housekeepers, janitors, and linen maids at Mercy.[3]

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[2] While most medical service departments at Mercy and General have not merged, the record indicated that at the time of the hearing the Ob-Gyn, emergency and ambulance services, admissions, purchasing, and storage departments at both hospitals had been merged into single respective departments.

[3] The Employer apparently agrees with the Petitioner that an all technical unit at General is appropriate, but argues that the other petitions be dismissed because they seek artificial fragmented units of employees at Mercy. Intervenor Local 79 urges that all the petitions be dismissed, contending that the Employer is in reality operating two separate hospitals and that the appropriate units should consist of all patient care employees at General and all unrepresented patient care employees at Mercy. Intervenor Local 688 contends that its contract covering housekeeping and maintenance employees

Cases 7—RC—12687 and 7—RC—12734: The record establishes that technical employees employed at Mercy and General work exclusively in their respective departments and have little or no contact with other hospital employees. All technical employees are separately supervised by fellow technicians and all have had 2 or 3 years of specialized training in a junior college or university and a year of in-service training at a hospital. Their work consists of performing highly specialized technical tests and procedures to obtain information used by doctors in connection with the care and treatment of patients. Although some technical employees have obtained certification from various private associations, there is no state licensing requirement for technicians, and all technical employees, regardless of certification, perform identical work.

Based on the above evidence, which establishes that the technical employees share a community of interest among themselves, we find that a unit consisting of all technical employees would be appropriate in this case. However, in view of the factors discussed above which establish functional integration between the operations of Mercy and General, i.e., common overall supervision, common personnel and labor relations policies, common wages, benefits, duties, and job classifications shared by all employees, open bidding by employees at both hospitals for jobs at either one, and substantial employee transfer and integration between facilities, including the merger of several departments into single ones, and that the two hospitals eventually will be merged into one in a couple of years, we find that the appropriate bargaining unit should encompass technical employees at both hospitals. Accordingly, we conclude that a single overall

at General is a bar to an election in Case 7—RC—12740 and further argues that the employees sought in that petition should be accreted to the existing unit of similarly classified employees at General. Intervenor MLPNA argues that the unrepresented LPN's at Mercy should be accreted to its unit of LPN's at General and further contends that LPN's should be represented in a bargaining unit separate from all other hospital employees.

unit of all technical employees employed by the Employer at Mercy and General is appropriate and we shall direct an election therein.

In doing so, however, we recognize that in **Barnert Memorial Hospital Center,**[4] and **St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.,**[5] a majority of the Board found appropriate units of technical employees including LPN's. While a majority of the Board still adheres to the view that LPN's properly belong in a unit with other technical employees, it is not so wedded to it that it will blindly require the inclusion of LPN's in every situation in which a unit of technical employees is sought. Exception will be made where circumstances warrant it. The instant case, in our view, qualifies as such an exception. Thus, we find, for the reasons set forth below, that in this case it would be error to include LPN's in the technical unit found appropriate above.

In reaching its decision to include LPN's in the technical unit in **St. Catherine's,** the Board majority relied on, *inter alia,* the absence of any separate bargaining history for the LPN's. In the instant case, the record indicates an established bargaining history among the LPN's at General who are currently represented for collective-bargaining purposes by Intervenor MLPNA, which has a contract with the Employer that will not expire until February 1, 1977. We do not desire to upset the stability inherent in that bargaining relationship by disenfranchising the LPN's at General and including them in the above technical unit. Nor do we think it proper to include in the above technical unit the LPN's at Mercy who are currently unrepresented. Such a finding would have the anomalous effect of fractionalizing the representation of the LPN's

[4] **Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center,** 217 NLRB No. 132 (1975).

[5] **St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.,** 217 NLRB No. 133 (1975).

employed by the Employer, a state of affairs which we are congressionally mandated to avoid. (However, we wish to reiterate that our exclusion of LPN's from this technical unit is restricted to the facts of this particular case.)

The parties could not agree on the placement in the technical unit of several individuals whom the Employer contends are supervisors.

The Employer argues that the section heads in the laboratory are supervisors, contending that they participate in the hiring process and in the evaluation and promotion of employees. The record establishes that, while they have not regularly participated in the hiring process, section heads have recently been present at employment interviews and were asked to make recommendations regarding the hiring of the last three applicants. These recommendations were followed. The record also establishes that section heads evaluate the work performance of employees and recommend them for promotions, and that these recommendations have always been followed. In addition, section heads give verbal warnings to employees concerning tardiness and absenteeism, although more severe disciplinary matters are referred to the division supervisor or lab administrator who has final authority over such matters as well as over work assignments, overtime, early dismissals, and time off. However, inasmuch as the record establishes that the section heads participate in the hiring of employees, evaluate them and effectively recommend promotions, we find that they exercise supervisory authority and are therefore supervisors within the meaning of the Act. We shall therefore exclude them from the unit.

The record establishes that the two senior x-ray technicians/assistant supervisors, one each at Mercy and General, spend about one-fourth of their time filling in for the division supervisor, but only in limited respects. While the Employer contends that these individuals are authorized to exercise the full scope of supervisory authority regularly exercised by the division supervisors, the record

establishes that they do not in fact exercise any such authority but merely route patients to preassigned rooms. The record further establishes that senior x-ray technicians/assistant supervisors are laboratory technicians and receive the same rate of pay as other laboratory technicians. Accordingly, we find that to the extent that these individuals direct the work of other technicians in the laboratory they do so merely in the capacity of leadman as a result of their being more experienced than other technicians. We therefore conclude that senior x-ray technicians/assistant supervisors are not supervisors within the meaning of the Act and we shall include them in the above technical unit.

The Employer contends that the nuclear medicine supervisor should be excluded from the Act on the basis of alleged supervisory status. However, the record is inadequate for us to determine the extent of the supervisory authority exercised by the nuclear medicine supervisor or the extent of his possible professional status. The only thing the record shows is that the nuclear medicine supervisor works in the nuclear medicine department which is part of the radiology department. Prior to this year, he worked alone, but during that time four other technicians, who received training elsewhere, have begun working in the nuclear medicine department on a rotating basis. While the record indicates that the nuclear medicine supervisor gives routine and instructional direction and help to the rotating technicians, the record does not establish with clarity whether the nuclear medicine supervisor exercises any supervisory authority over these other technicians. Accordingly, under the above circumstances, we shall permit the nuclear medicine supervisor to vote subject to challenge.

The Employer would also exclude the x-ray office supervisors from the unit because of their alleged supervisory authority over certain laboratory employees. The record establishes that the x-ray office supervisors are clerical employees working in the x-ray department.

They perform no duties which are performed by technicians; rather, their duties are restricted to typing papers for the radiologists and directing the work of other laboratory clerical employees, known as transcribers, who also type reports for the radiologists. In view of this evidence, we need not pass upon the question of whether the supervisory authority, if any, exercised by the x-ray office supervisors over the transcribers warrants their exclusion from the above technical unit inasmuch as the record adequately establishes that the x-ray office supervisors are clerical rather than technical employees. Accordingly, we shall exclude the x-ray office supervisors from the technical unit herein.

The Petitioner took no position concerning the placement of x-ray department students and the Employer urged that they be excluded from any unit found appropriate. The record establishes that these students receive training in the laboratory but receive no pay or fringe benefits. Therefore, we find that they do not share a community of interest with the technicians who comprise the unit herein found appropriate and we shall exclude x-ray department students from the unit.

Accordingly, for the reasons stated above and upon the entire record, we find that the following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All technical employees employed by the Employer at its Mercy and General Divisions, Bay City, Michigan; but excluding all other employees, guards, and supervisors as defined in the Act.

Case 7—RC—12740: Based on the record evidence, we find that the petitioned-for unit of housekeepers, janitors, and linen aides at Mercy is inappropriate and the petition should be dismissed. Ordinarily, because of the factors establishing functional integration between the operations of Mercy and General, we would, as we did

concerning the technical employees, find that any service and maintenance unit sought should encompass employees at both hospitals, and thus this petition would be dismissed because it seeks a unit substantially less than that one. However, as noted previously, because many of the service and maintenance employees at General are currently represented for collective-bargaining purposes under contracts which will not expire until 1977, we have no desire to disturb the stability of the bargaining relationship presently existing concerning those employees by finding that a single unit of service and maintenance employees at both hospitals is the only appropriate one.[6] In any event, for the purposes of this case we do not find it necessary to decide the appropriateness of the above petitioned-for unit on that basis. The instant petition does not even seek to encompass all of the service and maintenance employees at Mercy, the facility at which the petitioned-for employees are working, but instead seeks to represent a fragmented part of such a unit.[7] Thus, assuming *arguendo* that a separate unit of **all** service and maintenance employees at Mercy would be appropriate under the circumstances here, where similar classifications at General are currently represented in a separate unit under a contract effective until 1977, we still could not find the more limited unit sought to be appropriate.[8] Accordingly, we shall dismiss the petition.

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[6] We also do not wish to disturb the other bargaining units, discussed above, previously established at the two hospitals by virtue of separate bargaining histories. Those units are not now before us for consideration. However, this should not be taken to mean that in the future, if the issue as to their respective appropriateness is properly and timely raised, we will place our imprimatur on such pre-existing units.

[7] See **Newington Children's Hospital**, 217 NLRB No. 134 (1975).

[8] Our finding herein should not be construed as indicating our approval or disapproval of a separate unit of service and maintenance employees at Mercy. In the circumstances of this case, we need not, and do not, decide that issue. It is sufficient for our purposes here to note that the petitioned-for unit is inappropriate.

ORDER

It is hereby ordered that the petition in Case 7—RC—12740 be, and it hereby is, dismissed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, in Cases 7—RC—12687 and 7—RC—12734, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 7 shall direct and supervise the election, subject to the National Labor Relations Board Rules, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the elction date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[9] Those eligible shall vote whether they desire

[9] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear Inc., 156** NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.,** 394 U.S. 759 (1969). Accordingly, it is hereby directed that an

to be represented for collective-bargaining purposes by Local 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Ind.; by Hospital Employees' Divison, Service Employees International Union, Local 79, AFL-CIO; or by none of the above.[10]

Dated, Washington, D.C. June 18, 1975.

Betty Southard Murphy, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD.

(SEAL)

Members Kennedy and Penello, dissenting:

For the reasons set forth in our dissent in **Barnert Memorial Hospital Center,**[11] we disagree with our colleagues' finding that a single unit of all technical employees employed by the Employer at Mercy and General is appropriate. We agree, however, with their

election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 7 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make this list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

[10] Neither Intervenor Local 688 nor Intervenor MLPNA expressed any interest in participating in an election among technical employees.

[11] 217 NLRB No. 132 (1975).

decision to dismiss the petition for a unit of housekeepers, janitors, and linen aides at Mercy.

In finding the overall technical unit to be appropriate herein, our colleagues conclude "that in this case it would be error to include LPN's in the technical unit." By failing to include the LPN's, our colleagues appear to be departing from their majority position, as stated in **Barnert,** *supra,* and in **St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.,**[12] wherein it was held that technical employee units must include LPN's. Our colleagues attempt to justify their exclusion of LPN's by labeling the instant case as an exception to the general rule.[13]

In our judgment, the granting of a separate unit for technical employees, whether or not it includes LPN's, is contrary to the congressional mandate to avoid undue proliferation of bargaining units in the health care industry.[14] Mindful of the clear mandate from Congress to establish broad units in this industry, we would require all technical employees to be included in a broad service and maintenance unit.[15] Accordingly, we would dismiss the

[12] 217 NLRB No. 133 (1975).

[13] LPN's at General are currently represented for collective-bargaining purposes by Intervenor MLPNA, which has a contract with the Employer that will not expire until February 1, 1977.

[14] In both the House and Senate Reports concerning the health care amendments, Congress expressly approved of the Board's decision in **Extendicare of West Virginia, Inc., d/b/a St. Luke's Hospital,** 203 NLRB 1232 (1973), to establish broader units in this industry by including technical employees to a unit of service and maintenance employees. S. Rept. 93—766, 93d Cong., 2d Sess. 5 (1974); H. Rept. 93—1051, 93d Cong. 2d Sess. 7 (1974).

[15] See Member Penello's separate concurring opinion in **Mount Airy Foundation, d/b/a Mount Airy Psychiatric Center,** 217 NLRB No. 137 (1975). See also fn. 11 in Member Kennedy's dissent in **Mount Airy,** wherein he stated that he is "in complete agreement with the views expressed by Member Penello in his separate opinion with respect to the inclusion of 'licensed, certified or registered' employees and the LPN's in a service and maintenance unit."

petitions seeking to represent separate units of technical employees at Mercy and General.

Our colleagues have properly decided to dismiss the petition for a unit of housekeepers, janitors, and linen maids at Mercy.[16] In dismissing the petition, the majority notes that the Petitioner seeks to represent only a fragmented portion of the service and maintenance employees at Mercy. Assuming *arguendo* that a separate unit of all service and maintenance employees at Mercy would be appropriate under the circumstances herein, the majority concludes that the petition would have to be dismissed because of its failure to include all service and maintenace employees employed at Mercy. We agree with this conclusion as stated by our colleagues. However, assuming *arguendo* that a service and maintenance unit would be appropriate under the circumstances of this case, we would require, unlike our colleagues, that all technical employees be included in the unit.

Dated, Washington, D.C. June 18, 1975

Ralph E. Kennedy Member
John A. Penello Member
NATIONAL LABOR RELATIONS BOARD

[16]

224 NLRB No. 14

MFJ
D-1114
Bay City, Mich.

United States of America
Before the National Labor Relations Board

Bay Medical Center, Inc.,
and
Local 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Ind., Case 7-CA-12523

DECISION AND ORDER

(Dated May 24, 1976)

Upon a charge filed on November 21, 1975, by Local No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., herein called the Union, and duly served on Bay Medical Center, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint and notice of hearing on December 9, 1975, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 18, 1975, following a Board election in Cases 7-RC-12687, 7-RC-12734,

and 7-RC-12740, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about November 17, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 22, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 9, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 23, 1976, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On January 23, 1976, Respondent filed a response to the General Counsel's Motion for Summary Judgment although no response to the Notice to Show Cause was received.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

[1] Official notice is taken of the record in the representation proceeding, Cases 7—RC—12687, 7—RC—12734, and 7—RC—12740, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See **LTV Electrosystems, Inc.**, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); **Golden Age Beverage Co.**, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); **Intertype Co. v. Penello**, 269 F.Supp. 573 (D.C. Va., 1967); **Follett Corp.**, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

In its answer to the complaint and response to the Motion for Summary Judgment Respondent, in substance, attacks the validity of the certification based on its contentions (1) that the technical employee unit found appropriate by the Board is inappropriate because it is contrary to Board policy and the congressional mandate against proliferation of units in the health care industry, and (2) that the unit description is ambiguous and unworkable. Respondent seeks to submit evidence on its contentions either in a hearing or by brief and oral argument to the Board and in the alternative seeks summary judgment in its favor. In his Motion for Summary Judgment the General Counsel contends that Respondent seeks to relitigate the issue of unit appropriateness determined in the underlying representation proceeding and that no relitigation of representation case issues may be had. We agree.

Review of the record, including that in the representation proceeding, Cases 7-RC-12687, 7-RC-12734, and 7-RC-12740, establishes that after a hearing on unit questions the Regional Director transferred the proceedings to the Board. In its brief to the Board the Union contended, *inter alia,* that either separate units of technical employees at each of Respondent's two facilities or alternatively a single unit of all technicals at both facilities would be appropriate. On the other hand, Respondent argued in its brief, *inter alia,* that the technical units sought were inappropriate because they constituted artificial groupings which would severely fragmentize Respondent's employees, but that an overall unit was appropriate. After review of the record, including briefs filed by all the parties,[2] the Board issued its Decision, Order, and Direction of Election[3] on June 18, 1975, in which it found, *inter alia,*

[2] Briefs were also filed by the three intervenors: (1) Local 79, Hospital Employees' Division, Service Employees International Union, AFL-CIO, herein called Local 79; (2) Local 688, Catering Industry, Hospital Workers and Bartenders Union, AFL-CIO; and (3) the Michigan Licensed Practical Nurses Association.

[3] 218 NLRB No. 100.

that a single unit of all technical employees at both facilities operated by Respondent was appropriate, including certain categories of employees whom the Respondent would have excluded.[4] The election was held on July 18, 1975. Challenges were determinative of the election results. Objections concerning the waiver of initiation fees by the Union were filed by Respondent. The Regional Director ordered a hearing on election objections and challenged ballots. At the hearing the parties stipulated that all challenges be sustained except six challenged ballots which were not sufficient to affect the outcome of the election.[5] On August 27, 1975, the Hearing Officer issued his Report and Recommendations on Objections to Election and Challenged Ballots in which he recommended that the objections be overruled and that the appropriate certification be issued by the Regional Director since the six sustained challenged ballots were not determinative. Respondent filed exceptions to the Hearing Officer's Report limited in substance to its contention that the certification should not issue and the petitions should be dismissed because the technical unit was inappropriate. On September 18, 1975, the Regional Director issued his Supplemental Decision, Revised Tally of Ballots, and Certification of Representative, overruling the objections, denying the motion to dismiss the petitions because the unit issues were not relitigable, and certifying the Union since the six unsustained challenged ballots were not determinative. On September 29, 1975, Respondent filed a request for review reiterating its unit contentions. By use of telegram on November 11, 1975, the Board denied review on the ground that the request raised no substantial issues warranting review.

[4] On July 14, 1975, Intervenor Local 79 filed a motion for clarification of decision contending that the Board's unit description was vague and not definable as to which employees were to be considered "technical." On July 16, 1975, the Board by telegram denied the motion on the grounds that issues raised therein could best be resolved through the challenge procedure.

[5] Local 79, which had also filed objections, withdrew them at the hearing.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues,[6] which were or could have been litigated in a prior representation proceeding.

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence,[7] nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

In this proceeding, Respondent contends that it is entitled to present evidence either at a hearing or by brief and oral argument before the Board on the issues raised by it. We note that Respondent had a hearing in the prior representation case and submitted a brief to the Board on the unit issues it seeks to raise in this proceeding and that

[6] See **Pittsburgh Plate Glass CO. v. N.L.R.B.**, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] Respondent requests reconsideration of the Board decision in the underlying representation case citing **American Hospital Management Corp. d/b/a Mad River Community Hospital**, 220 NLRB No. 58 (1975), and **St. Elizabeth's Hospital of Boston**, 220 NLRB No. 61 (1975), as recent Board hospital technical unit cases which support denial of the General Counsel's Motion for Summary Judgment. We do not agree. These cases support the appropriateness of technical units in the health care industry and the Board in its unit determination considered the Respondent's circumstances and those of the health care industry. Further, with regard to the Respondent's contention concerning the unit description, these cases are consistent with the unit composition determinations made by the Board in the underlying representation proceedings herein. In this connection see fn. 4, *supra*. We therefore deny Respondent's requests for reconsideration and for the opportunity to fully brief the issues raised by those cases.

it had stipulated to the resolution of all determinative challenges. We therefore find its contention to be without merit as evidentiary hearings are not required in unfair labor practice cases and summary judgment against a respondent is appropriate where, as here, there are no properly litigable issues of fact to be resolved.[8] Accordingly, we shall grant the General Counsel's Motion for Summary Judgment and deny the Respondent's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business of the Respondent

Respondent is, and has been at all times material herein, a nonprofit Michigan corporation with its principal office and place of business at 1908 Columbus Avenue, Bay City, Michigan, where it is engaged in the operation of nonprofit hospitals providing health care services at its Mercy and General Divisions, the facilities involved in this proceeding. During the 12-month period ending November 30, 1975, a representative period, Respondent, in the course and conduct of its business operations, received gross revenues in excess of $500,000 for its hospital services and purchased supplies valued in excess of $50,000 of which supplies valued in excess of $4,500 were obtained directly from suppliers located outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

[8] **The Woods Schools**, 222 NLRB No. 169 (1976), **Locust Industries, Inc.**, 221 NLRB No. 85 (1975).

II. The Labor Organization Involved

Local No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The Unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All technical employees employed by Respondent at its Mercy and General Divisions, Bay City, Michigan; but excluding all other employees, guards, and supervisors as defined in the Act.

2. The Certification

On July 18, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 18, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about September 25, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive

collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 17, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 17, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See **Mar-Jac Poultry Company, Inc.**, 136 NLRB 785 (1962); **Commerce Company d/b/a Lamar Hotel**, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); **Burnett Construction Company**, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Bay Medical Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., is a labor organization within meaning of Section 2(5) of the Act.

3. All technical employees employed by Respondent at its Mercy and General Division, Bay City, Michigan; but excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 18, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 17, 1975 and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Bay Medical Center, Inc., Bay City, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., as the exclusive bargaining representative of its employees in the following appropriate unit:

> All technical employees employed by Respondent at its Mercy and General Divisions, Bay City,

Michigan; but excluding all other employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Mercy and General Divisions, Bay City, Michigan, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. May 24, 1976.

BETTY SOUTHARD MURPHY Chairman
JOHN H. FANNING Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

Notice to Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local No. 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All technical employees employed by Respondent at its Mercy and General Divisions, Bay City, Michigan: but excluding all other employees, guards, and supervisors as defined in the Act.

BAY MEDICAL CENTER, INC.
(Employer)

By.....
(Representative) (Title)

Dated .....

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan 48226, Telephone 313—226-3244.

NATIONAL LABOR RELATIONS ACT

as amended by

LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT, 1947

and

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

[¶ 601]

(Act of July 5, 1935 c. 372, 74th Cong., 1st Sess., 49 Stat. 449, as reenacted by Act of June 23, 1947, Title I, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, amended by Act of September 14, 1959, P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519, and last amended by Act of July 26, 1974, P. L. 93-360, 93rd Cong., 2nd Sess., 88 Stat. 395; 29 U. S. C., § 151-168 Section 3(c) was amended by Act of January 2, 1975, P. L. 93-608, 93rd Cong. 2nd Sess., 88 Stat. 1792.)

AN ACT to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[¶ 602] FINDINGS AND POLICIES

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest,

which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of

burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. [July 5, 1935, c. 372 § 1, 49 Stat. 449; June 23, 1947, c. 120, title I, § 101, 61 Stat. 136; 29 U. S. C., § 151.]

Amendments.—The Labor Management Relations Act, 1947, added "some" in the first sentence of Sec. 1 and the entire fourth paragraph.

[¶ 603] **DEFINITIONS**

Sec. 2. When used in this Act—

[¶ 604] [Sec. 2(1)—Person]

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

Amendments.—The Labor Management Relations Act, 1947, added "labor organizations" to Sec. 2(1).

[¶ 605] [Sec. 2(2)—Employer]

(2) The Term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Amendments.—Sec. 1 of P. L. 93-360, effective August 25, 1974, amended subsection (2) to read as above. Prior to amendment, it read as follows:

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

The Labor Management Relations Act, 1947, amended Sec. 2(2) to read as set forth above. Previously, it read as follows:

"(2) The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political

subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[¶ 606] [Sec. 2(3)—Employee]

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse,* or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Amendments.—The Labor Management Relations Act, 1947, added the material following the asterisk (*).

[¶ 607] [Sec. 2(4)—Representatives]

(4) The term "representatives" includes any individual or labor organization.

[¶ 608] [Sec. 2(5)—Labor Organization]

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

[¶ 609] [Sec. 2(6)—Commerce]

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

[¶ 610] [Sec. 2(7)—Affecting Commerce]

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

[¶ 611] [Sec. 2(8)—Unfair Labor Practice]

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

[¶ 612] [Sec. 2(9)—Labor Dispute]

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

[¶ 613] [Sec. 2(10)—National Labor Relations Board]

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

Amendments.—The Labor Management Relations Act, 1947, substituted "provided for in" for "created by."

[¶ 614] [Sec. 2(11)—Supervisor]

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[¶ 616A] [Sec. 2(14)—Health Care Institution]

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person. [July 5, 1935, c. 372 § 2 49 Stat. 450;

June 23, 1947, c. 120, title I, § 101, 61 Stat. 137; July 26, 1974, P. L. 93-360, § 1; 29 U. S. C. § 152.]

Amendments.—Sec. 1 of P. L. 93-360, effective August 25, 1974, added Sec. 2(14) above.

[¶ 627] [Sec. 8(a)—Employer Unfair Labor Practices]

(a) It shall be an unfair labor practice for an employer—

Amendments.—The Labor Management Relations Act, 1947, added "(a)."

[¶ 632] [Sec. 8(a)(5)—Refusal to Bargain]

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

[¶ 642] REPRESENTATIVES AND ELECTIONS

Sec. 9.

[¶ 643] [Sec. 9(a)—Exclusive Representatives; Employees' Adjustment of Grievances Directly with Employer]

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to

have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Amendments.—The Labor Management Relations Act, 1947, added all the material following "employer" in the first proviso in Sec. 9(a) above.

[¶ 644] [Sec. 9(b)—Determination of Bargaining Unit by Board]

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Amendments.—The Labor Management Relations Act, 1947, amended Sec. 9(b) to read as above. Prior to amendment it read as follow:

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

IN THE
SUPREME COURT OF THE
UNITED STATES
_____ TERM, 1978
NO._____

****

BAY MEDICAL CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

****

NOTICE OF APPEAL

****

LAMBERT, LESER, FITZHUGH & HEBERT, P.C.
By: William M. Lambert
Attorneys for Petitioner
309 Davidson Building
P. O. Box 835
Bay City, Michigan 48707
(517) 893-3518

NOTICE OF APPEAL

Bay Medical Center, Inc. hereby files its Notice of Appeal from the Decision and Judgment of the United States Court of Appeals for the Sixth Circuit dated December 28, 1978 and January 23, 1979 respectively.

This appeal is taken pursuant to Rule 10 and Rule 13 of the Rules of the United States Supreme Court and the statutes under which this appeal is taken are as follows: 28 USC § 1254(1).

Dated: April 3, 1979.

LAMBERT, LESER, FITZHUGH & HEBERT, P.C.

By /s/ William M. Lambert
William M. Lambert
Attorneys for Petitioner
309 Davidson Building
P. O. Box 835
Bay City, Michigan 48707
(517) 893-3518

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1978

NO._____

****

BAY MEDICAL CENTER,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

United States Court of Appeals for the Sixth Circuit
Case No. 76-1881

****

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF BAY)

Barbara J. Duso, secretary in the law offices of Lambert, Leser, Fitzhugh & Hebert, P.C., being first duly sworn, deposes and says that on April 3, 1979, she did mail by first-class mail, postage fully prepaid at Bay City, Michigan, a copy of the Notice of Appeal for and on behalf of the Petitioner in the above-entitled matter, by mailing the same to Elliott Moore, Deputy Association General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, Washington, D.C. 20570.

/s/ Barbara J. Duso
Barbara J. Duso

Subscribed and sworn to before me this 3rd day of April, 1979.

/s/ Dolores H. Ruterbusch
Dolores H. Ruterbusch, Notary Public
Bay County, Michigan
My commission expires: 2-13-80

Supreme Court, U. S.
FILED
JUN 20 1979
MICHAEL RODAK, JR., CLERK

No. 78-1617

In the Supreme Court of the United States

OCTOBER TERM, 1978

BAY MEDICAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Long Island College Hospital v. *NLRB*, 566 F. 2d 833, cert. denied, 435 U.S. 996	5, 8
Memorial Hospital of Roxborough v. *NLRB*, 545 F. 2d 351	5, 6, 7, 8
NLRB v. *West Suburban Hospital*, 570 F. 2d 213	5, 8
North Memorial Medical Center, 244 N.L.R.B. 218	8
Packard Motor Co. v. *NLRB*, 330 U.S. 485	6
St. Vincent's Hospital v. *NLRB*, 567 F. 2d 588	8

Statute and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
Section 8(a)(1), 29 U.S.C. 158(a)(1)	4

Statute and regulation—Continued	Page
Section 8(a)(5), 29 U.S.C. 158(a)(5)	4
Section 9(b), 29 U.S.C. 159(b)	6
29 C.F.R. 102.60(b)	9
Miscellaneous:	
Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (G.P.O. 1974)	6-7
H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. (1974)	6
S. 2292, 93d Cong., 1st Sess. (1973)	7
S. Rep. No. 93-766, 93d Cong., 2d Sess. (1974)	6

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1617

BAY MEDICAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-23) is reported at 588 F.2d 1174. The decision of the National Labor Relations Board (Pet. App. 40-50) is reported at 224 N.L.R.B. 69. The decision of the Board directing an election in the related representation proceeding (Pet. App. 26-39) is reported at 218 N.L.R.B. 620.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24) was entered on January 23, 1979. The petition for a writ of certiorari was filed on April 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly excluded licensed practical nurses from a unit of technical employees.

STATEMENT

1. Petitioner operates two hospitals, Mercy and General, as divisions of a single nonprofit corporation (Pet. App. 28). Since at least 1972 the licensed practical nurses (LPNs) at General have been represented by the Michigan Licensed Practical Nurses' Association (MLPNA), which had a collective bargaining agreement with petitioner running from March 1, 1974, to February 28, 1977 (Pet. App. 29).

In the autumn of 1974, Local 486 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 486) filed petitions with the Board requesting representation elections in a unit of unrepresented technical employees at each hospital, or, alternatively, an election in a combined unit of all the technical employees of both hospitals (Pet. App. 29). Petitioner opposed the petitions on the ground, *inter alia*, that the appropriate unit was a broader unit including not only

various technical employees at both hospitals but also the janitors, housekeepers, and other non-professional, non-technical employees at Mercy (A. 9).[1]

Following a hearing the Board issued a decision and direction of election; it ruled that "a unit consisting of all technical employees [at both Mercy and General] would be appropriate" (Pet. App. 14-15).[2] In so doing, the Board decided that, although it normally included LPNs in such technical employee units, it would not do so in this case because (Pet. App. 31-32):[3]

> the record indicates an established bargaining history among the LPNs at General who are currently represented for collective-bargaining purposes by Intervenor MLPNA, which has a contract with the Employer that will not expire until February 1, 1977. We do not desire to up-

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[1] At that time, both Local 486 and petitioner opposed the inclusion of the LPNs in the proposed units (A. 4, 6, 9). ("A." refers to the appendix to the briefs in the court of appeals.) Intervenor MLPNA urged that the Mercy LPNs be accreted to the unit of General LPNs which it presently represented (Pet. App. 13-14, n.3).

[2] The Board rejected Local 486's request for a unit of then unrepresented housekeepers, janitors, and linen aides at Mercy, finding that it was inappropriate because, *inter alia*, that proposed unit did "not even seek to encompass all of the service and maintenance employees * * * but instead [would have covered] a fragmented part of such a unit" (Pet. App. 34-35).

[3] Members Penello and Kennedy concurred in the Board's dismissal of the petition for a unit of housekeepers (Pet. App. 37-38). They dissented from the finding that a separate technical unit was appropriate, stating that they "would require all technical employees to be included in a broad service and maintenance unit" (Pet. App. 38).

> set the stability inherent in that bargaining relationship by disenfranchising the LPN's at General and including them in the above technical unit. Nor do we think it proper to include in the above technical unit the LPN's at Mercy who are currently unrepresented. Such a finding would have the anomalous effect of fractionalizing the representation of the LPN's employed by the employer, a state of affairs which we are congressionally mandated to avoid. (However, we wish to reiterate that our exclusion of LPN's from this technical unit is restricted to the facts of this particular case.)

Local 486 won the election and, on September 18, 1975, the Board's Regional Director certified Local 486 as the unit's collective bargaining representative, over further objections of petitioner concerning the definition of the unit (A. 35-37, 38-44). Petitioner filed a request for review with the Board, contending, among other things, that LPNs had been improperly excluded from the definition of the bargaining unit; the Board denied review on the ground that the request raised "no substantial issues" (Pet. App. 43; A. 44-49).

2. Petitioner subsequently refused to bargain with Local 486. The Board found that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relation Act, 29 U.S.C. 158(a)(5) and (1), and it ordered petitioner to recognize and bargain with Local 486 (Pet. App. 40-52).

3. The court of appeals enforced the Board's order, finding that the Board acted within its authority in considering the bargaining history of petitioner

and the LPNs (Pet. App. 21-23). The court noted that, at the time the Act was amended to extend coverage to nonprofit health care institutions, the chairman of the Senate committee that drafted the amendments pointed out that:

> While the Board has, as a rule, tended to avoid any unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, *particularly where there is such a history* in the area . . .
>
> While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units.

Pet. App. 22-23; emphasis supplied by the court.

The court distinguished *Memorial Hospital of Roxborough* v. *NLRB*, 545 F.2d 351 (3d Cir. 1976); *Long Island College Hospital* v. *NLRB*, 566 F.2d 833 (2d Cir. 1977), cert. denied, 435 U.S. 996 (1978); and *NLRB* v. *West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978). In those cases reviewing courts reversed the Board's unit determinations because the Board failed to consider adequately the congressional admonition against undue proliferation of units. But, as the court of appeals held here, the NLRB's "determination not to include LPNs in a bargaining unit of technical employees was a considered decision in

which the Board balanced the policy against undue proliferation of bargaining units with the policy against disrupting existing bargaining relationships. This was the correct standard, and there was a rational basis for the decision" (Pet. App. 23).

ARGUMENT

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), empowers the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." The Board's determination of an appropriate unit involves "a large measure of informed discretion," and the decision of the Board is "rarely to be disturbed." *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

Congress' extension of the Board's statutory jurisdiction to nonprofit health care institutions in 1974 did "not create special rules for bargaining unit determination in the health care industry" (*Memorial Hospital of Roxborough* v. *NLRB*, *supra*, 545 F.2d at 360). To be sure, both the Senate and House committees stated that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 6-7 (1974); *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor*

Relations Act, 1974 12, 274-275 (G.P.O. 1974). But, as the court of appeals correctly noted, this admonition was not intended to prevent the Board from approving small units in appropriate circumstances (see Pet. App. 22-23).[4]

In the instant case, the Board carefully weighed its policy of including LPNs in units of technical employees (a policy that serves to limit the number of bargaining units within a single hospital) against the special circumstance here, *i.e.*, that the LPNs at one of petitioner's two facilities were already represented in a separate unit—an arrangement that both parties had accepted and that had resulted in an effective collective bargaining agreement. The Board acted well within its discretion in excluding the LPNs from the new unit, concluding that it did "not desire to upset the stability in [the MLPNA-General] bargaining relationship" (Pet. App. 31). The Board thus accommodated established policy to the special facts of the case.

Petitioner contends (Pet. 7-8) that the Board has simply rubber-stamped the certification of a state agency, but petitioner is wrong. The effectiveness of the collective bargaining relationship between the LPNs at General and petitioner, not the state certification of the unit, was the dispositive factor. There-

---

[4] Indeed, a proposal by Senator Taft (S. 2292, 93d Cong., 1st Sess. (1973)), which would have limited the Board to designating only four appropriate units in health care institutions—(1) professional employees, (2) technical employees, (3) clerical employees, and (4) service and maintenance employees—was not reported out of committee. See *Memorial Hospital of Roxborough* v. *NLRB*, *supra*, 545 F.2d at 360 n.12.

fore, the circumstances here are distinguishable from *Memorial Hospital of Roxborough* v. *NLRB*, *supra*, 545 F.2d at 354, 360-361; and *Long Island College Hospital* v. *NLRB*, *supra*, 566 F.2d at 837. In those cases there were on effective, established bargaining relationships between the hospitals and the state-certified units, and the courts found that the Board had simply deferred to the state certifications without making its own independent examination of the relevant factors.[5]

Similarly, the instant case presents no conflict with *NLRB* v. *West Suburban Hospital*, *supra*, 570 F.2d at 215, where the court of appeals determined that the Board had not adequately considered the congressional desire to avoid the proliferation of hospital units. The Board took that into account here. And *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588, 592 (3d Cir. 1977), where the court found that the Board erred in certifying a unit of hospital boiler operators because, unlike the other service and maintenance workers, they were licensed by the state, also does not help petitioner. The decision here was not based on the factors involved in *St. Vincent's Hospital*, but on the importance of maintaining an existing, stable bargaining relationship.[6]

In sum, the Board and the court of appeals applied established principles to the particular facts of this case. There is no dispute about the principles themselves, and thus there is no reason to grant review.

[5] The Board's decision here is not inconsistent with *North Memorial Medical Center*, 224 N.L.R.B. 218, 219-220 (1976), where a limited unit based on an old state certification was rejected because, *inter alia*, the representative in the old unit had been decertified and there was no present collective bargaining relationship in that unit. These factors are not present here.

[6] Petitioner's contention (Pet. 12-13) that the Board's definition of the unit was "ambiguous and unsupported by the record" raises no issue warranting further review. The Board's post-election challenge procedure (A. 35-36) disposed of all outstanding questions of who was included in the unit. In any event, issues concerning the scope of the unit may be resolved through normal procedures for unit clarification. See the Board's Rules and Regulations, 29 C.F.R. 102.60(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS.

	PAGE
Interest of the Amicus Curiae	1
Reasons for Granting the Writ	3
I. The Sixth Circuit's Decision Failed to Accord Proper Authority to the Congressional Admonition to Prevent Bargaining Unit Proliferation in the Health Care Industry	3
II. The Board's Reliance on Prior Bargaining History Manifestly Disregards the Board's Own Guideline Decisions and Constitutes an Abuse of Its Statutory Duty Under the Act	6
Conclusion	10

TABLE OF AUTHORITIES.

Cases.

Barnert Memorial Hospital Center, 217 NLRB No. 132 (1975) 6, 7

Bay Medical Center, 218 NLRB 620 (1975) 2, 3, 6

Bay Medical Center v. NLRB, ... F. 2d ....., No. 76-1881 (1978) 3

Duke University, 217 NLRB No. 136 (1975) 7

Extendicare of West Virginia, 203 NLRB No. 170 (1973) 3

Four Seasons Nursing Center, 208 NLRB No. 50 (1974). 3

LaCrosse Telephone Corp. v. Wisconsin Employment Board, 336 U. S. 18 (1948) 8

Memorial Hospital of Roxborough v. NLRB, 545 F. 2d 351 (3d Cir., 1976) 8, 9

Mercy Hospitals of Sacramento, Inc., 217 NLRB No. 131 (1975) 7

Mount Airy Foundation, 217 NLRB No. 137 (1975) ... 7

NLRB v. Metropolitan Life Ins. Co., 380 U. S. 438 (1975) 8

Newington Children's Hospital, 217 NLRB No. 134 (1975) 7

North Memorial Medical Center, 224 NLRB No. 28 (1976) 7, 8

Peerless of America, Inc. v. NLRB, 484 F. 2d 1108 (7th Cir., 1973) 8

St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc., 217 NLRB No. 133 (1975) 6, 7

Sisters of St. Joseph's of Peace, 217 NLRB No. 135 (1975) 7

The Atchison, Topeka and Santa Fe R. R. Co. v. The Wichita Board of Trade, 412 U. S. 800 (1972) 8

Woodland Park Hospital, 205 NLRB No. 144 (1973) ... 3

Statutes.

Public Law 93-360 (S. 3203) (August 25, 1974) 2, 3

Committee Reports.

House of Representatives Report No. 93-1051, 93d Congress, 2d Sess. (1974) 3

Senate Report No. 93-766, 93d Congress, 2d Sess. (1974) 3

Congressional Record.

120 Cong. Rec. S6940-1 (Daily Ed. May 2, 1974) 5

120 Cong. Rec. H6393 (Daily Ed. July 11, 1974) 4

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INTEREST OF THE AMICUS CURIAE[1]

The American Hospital Association (hereafter "AHA")[2] files this brief *amicus curiae* to present its views in a case of great importance in the application of the National Labor Relations

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1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

2. The AHA is a non-profit Association of more than 6,500 member institutions engaged in the delivery of health care. It is the largest association of health care institutions of its kind in the United States.

Act to the newly-covered health care industry.[3] The question presented in this case is the extent to which the National Labor Relations Board (hereinafter "the Board") may disregard Congressional intent by certifying hospital bargaining units based upon its own policy interpretations that prior bargaining history should control such unit determinations.

AHA has been involved in the instant case subsequent to the Board's determination that a unit of technical employees separate and apart from licensed practical nurses was appropriate at Bay Medical Center. The Board's decision was based solely upon the existence of prior bargaining history in a small unit of licensed practical nurses and ignored the Congressional intent to prevent proliferation of bargaining units in a health care institution.[4] This decision was appealed by the Medical Center to the U. S. Court of Appeals for the Sixth Circuit. AHA filed a brief *amicus curiae* and participated in oral argument.

AHA joined the Petitioner before the Sixth Circuit in asserting that the Board's determination was erroneous in two critical respects: (1) the certification of a separate unit of technical employees which failed to include licensed practical nurses was in conflict with the Congressional intent and legislative history of the 1974 amendments; and (2) the unit determination was in conflict with the Board's own guideline decisions[5] and prior rulings with respect to the importance of bargaining history.[6]

The Sixth Circuit upheld the Board's determination but failed to adequately address the inconsistencies of the Board's guideline decisions with its decision in this case; as well as the Board's failure to comply with Congressional intent. This case provides the first opportunity for this Court to address the issue of the

3. In 1974, Congress enacted Public Law 93-360 (S. 3203) which amended the Taft-Hartley Act to bring voluntary non-profit health care institutions under the federal law.

4. *Bay Medical Center,* 218 NLRB 620 (1975).

5. See pp. 6-8 and note 15, *infra.*

6. See p. 7, *infra.*

appropriateness of separate, proliferated units *vis a vis* the Congressional intent and legislative history of the 1974 Health Care Amendments.

I.

THE SIXTH CIRCUIT'S DECISION FAILED TO ACCORD PROPER AUTHORITY TO THE CONGRESSIONAL ADMONITION TO PREVENT BARGAINING UNIT PROLIFERATION IN THE HEALTH CARE INDUSTRY.

In its decision below[7] the Court of Appeals for the Sixth Circuit concluded that the Board's determination[8] not to include LPN's in a bargaining unit of technical employees was correct. The Court held that the Board's determination "was a considered decision in which the Board balanced the policy against undue proliferation of bargaining units[9] with the policy against disrupting existing bargaining relationships."[10] AHA submits that neither the Board nor the Court properly considered the importance of the Congressional admonition in the 1974 Health Care Amendments[11] to prevent unit proliferation.

7. *Bay Medical Center* v. *NLRB,* ..... F. 2d ....., No. 76-1881 (December 28, 1978).

8. 218 NLRB 620 (1975).

9. "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decision in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

1. By our reference to *Extendicare,* we do not necessarily approve all of the holdings of that decision."

"Legislative History of the Coverage of Nonprofit Hospitals Under The National Labor Relations Act, 1974" (hereinafter Legis. Hist.) S. Rep. No. 93-766 (1974) 93d Cong., 2d Sess. 5 at 12; H. Rep. No. 93-1501, 93d Cong., 2d Sess. 6-7 (1974) at 274-275.

10. *Bay Medical Center* v. *NLRB, supra.*

11. Pub. L. 93-360 (S. 3203) August 25, 1974.

With respect to bargaining units that were in existence prior to the federal law, Congress provided clear intent to displace these relationships which were in conflict with the Health Care Amendments and which had arisen under state law.

Thus, during Congress' consideration of the Health Care Amendments, legislators were confronted with the effect of passage of the uniform federal Act upon hospital bargaining units in existence under state law. The legislative history demonstrates Congress' intent, as follows:

> "MR. QUIE. Mr. Speaker, if the gentlemen will yield further, what is the application of the legislation on hospitals and unions *presently engaged in bargaining under State laws,* or even where no law, State or Federal, had previously applied to them?
>
> "MR. THOMPSON of New Jersey. To attempt to answer your questions, it seems *that those hospitals presently engaged in bargaining will have to meet the requirements of the National Labor Relations Act when this legislation becomes effective.* For instance, had a hospital recognized a minority union, it is contemplated that the hospital could no longer continue recognition. It would seem the better practice that if either party questioned the validity of the recognition or the appropriate unit, they should file a representation petition with the NLRB."[12] (Emphasis supplied.)

As a consequence, Congressional concern regarding preexisting bargaining units and their appropriateness under the uniform federal Act, necessitates the conclusion that where such units are found to be inappropriate, they would have to be redetermined by the Board. Specifically, the Board would be required to consider appropriateness of hospital bargaining units in light of the Congressional admonition to prevent unit proliferation. Thus, before a redetermined unit is to be classified as appropriate, the Board must find that such determination

12. 120 Cong. Rec. H6393 (daily ed. July 11, 1974).

does *not* cause a proliferation of bargaining units.[13] The Board failed to do this in deciding that a divided unit of technical employees, separate and apart from licensed practical nurses, was appropriate in this case.

AHA submits, that it is this crucial fact which the Board in the first instance, and the Sixth Circuit on review, failed to consider in rendering their decisions. As a result of the particular attention focused on the health care industry in considering these amendments, Congress felt compelled to admonish the Board to *prevent* unit proliferation. In no other industry has the Congress exhibited such special concern or provided such a specific directive. This admonition, by definition, inherently conflicts with recognized Board policy to preserve prior bargaining relationships *which was developed for other industries;* particularly where such existing relationships constitute unit proliferation. Congress' paramount concern was to have the Board prevent small units and many units in health care institutions.

However, both the Board and the Court misplaced their emphasis on the "stability of a prior bargaining relationship", rather than on the Congressional admonition to prevent proliferation. In other industries where there is no such inherent

13. It is important to consider the remarks of Senator Taft, co-manager of S. 3203 commenting upon the necessity for avoiding unit proliferation in hospitals.

> "*Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care . . . [I] cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented. . . [T]he administration problems from a practical operation viewpoint and labor-relation viewpoint must be considered by the Board on this issue.* Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard." 120 Cong. Rec. § S6940-1 (daily ed. May 2, 1974) (emphasis added)

conflict, the Board's determination to preserve prior bargaining relationships may well be properly balanced against other competing interests. But in the health care industry application of such policy cannot help but foster proliferation, and as such, vitiate the Congressional intent.

II.

THE BOARD'S RELIANCE ON PRIOR BARGAINING HISTORY MANIFESTLY DISREGARDS THE BOARD'S OWN GUIDELINE DECISIONS AND CONSTITUTES AN ABUSE OF ITS STATUTORY DUTY UNDER THE ACT.

In order to meet its responsibilities and carry out Congress' desire for a uniform, national policy, we submit that the Board should be required to carefully review bargaining unit relationships which pre-date the Act. Upon their review, where an existing bargaining unit contravenes Congressional intent, or the Board's own guidelines, the Board should be called upon to revise the composition of that unit.

This, however, is precisely what the Board failed to do in the instant case. The Board instead relied upon past bargaining history as the controlling factor[14] to determine that a unit of all technical employees at Bay Medical Center, Inc., excluding licensed practical nurses was appropriate; a direct departure from the Board's own guideline decisions holding that technical units shall include licensed practical nurses.[15]

14. "In the instant case, *the record indicates an established bargaining history among the LPN's at General* who are currently represented for collective-bargaining purposes by Intervenor MLPNA, which has a contract with the Employer that will not expire until February 1, 1977. *We do not desire to upset the stability inherent in that bargaining relationship by disenfranchising the LPN's at General and including them in the above technical unit. Nor do we think it proper to include the above technical unit the LPN's at Mercy who are currently unrepresented.*" (A. 18-19) (emphasis added).

15. *Barnert Memorial Hospital Center,* 217 NLRB No. 132 (1975); *St. Catherine's Hospital of Dominican Sisters of Kenosha,*

(Footnote continued on next page.)

Not only did the Board fail to carefully analyze the facts herein in light of its guideline *Barnert* and *St. Catherine's* decisions, but of parallel significance, the decision herein does not even comport with the Board decisions with respect to bargaining history. Thus, in *North Memorial Medical Center,* 224 NLRB No. 28 (1976), the Board, when presented with facts similar to the instant case, dismissed a petition for a unit of emergency medical technicians who had a 14-year bargaining history. The Board stated:

> "The Regional Director's reliance on the bargaining history to support his contrary finding is misplaced. For while bargaining history is relevant in determining the appropriateness of a unit, it is not the sole factor. Under the circumstances herein, we find it is not controlling.
>
> We note at the outset that the bargaining history in this case took place under the Minnesota statute which permitted the formulation of fragmented units such as the one sought herein. This is in sharp contrast with the principal thrust of the legislative history of the health care amendments of the Act, admonishing the Board to avoid undue proliferation of bargaining units in the health care industry." 224 NLRB No. 28.

(Footnote continued from preceding page.)

Wisconsin, Inc., 217 NLRB No. 133 (1975); *Duke University,* 217 NLRB No. 136 (1975); *Mercy Hospitals of Sacramento, Inc.,* 217 NLRB No. 131 (1975); *Mount Airy Foundation,* 217 NLRB No. 137 (1975); *Newington Children's Hospital,* 217 NLRB No. 134 (1975); *Shriners Hospital for Crippled Children,* 217 NLRB No. 138 (1975); *Sisters of St. Joseph's of Peace,* 217 NLRB No. 135 (1975). In these guideline health care industry bargaining unit decisions the Board determined five basically appropriate units, as follows:

1. Technical employees, including licensed practical nurses, *Barnert, supra; St. Catherine's, supra.*
2. All other professionals, *Mercy Hospitals, supra.*
3. Service and maintenance employees, *Newington, supra, Duke University, supra; Mount Airy, supra; Shriners, supra.*
4. Registered nurses, *Mercy Hospitals, supra.*
5. Business office clerical employees, *Mercy Hospitals, supra; Sisters of St. Joseph, supra.*

Nowhere in the instant decision does the Board articulate a similar consideration of the congressional concern. Thus, the Board's *North Memorial* decision and the instant case are in diametric opposition, without any explanation of the reasons why this is so. The Board only concludes herein that "we do not desire to upset the stability inherent in that bargaining relationship" by including the LPN's in the technical unit (A. 19). It is clear that it is this kind of "substitution of a conclusion for explanation [which] does not permit a reviewing Court to do its job." *Peerless of America, Inc.* v. *N. L. R. B.*, 484 F. 2d 1108, 1119 (7th Cir., 1973); *The Atchison, Topeka and Santa Fe R. R. Co.* v. *The Wichita Board of Trade*, 412 U. S. 800, 41 L. W. 4905, 4911 (1973). The Board has neither properly disclosed the basis of its Order herein nor provided clear indication that it has even exercised its discretion. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965). Such a conclusory statement without articulation of its reasons or distinction among other Board decisions is insufficient to meet the requirements of the Act.

In referring to the statutory duty of the National Labor Relations Board under § 9(b) of the Act, the Third Circuit Court of Appeals stated in *Memorial Hospital of Roxborough* v. *NLRB*, 545 F. 2d 351 (1976):

> "This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 24-27 (1948). Here, however, the Board abdicated its required duty by accepting the PLRB determination without exercising its own mandated discretion." *Memorial Hospital of Roxborough* v. *National Labor Relations Board, supra*, at 93 LRRM 2577.

And in holding that the Board "abdicated its required duty" by applying its comity doctrine to the state board's bargaining unit decision, the Court wrote:

> "in granting comity to the unit determination of the PLRB the Board has neither exercised the discretion that Congress mandated be exercised in § 9(b) of the NLRA nor complied with the Congressional admonition that it consider proliferation of units in the health care industry. As we have said, the Board's action here thus overstepped the law, the national labor policy, and Congress' indicated intent with respect to health care institutions." *Memorial Hospital* v. *NLRB, supra*, at 93 LRRM 2578.

The parallel between *Memorial Hospital of Roxborough* v. *NLRB, supra*, and this case is noteworthy. Here, the Board has again sought to abdicate its required duty; this time, however, by using bargaining history which arose under state law.

CONCLUSION

By having accorded controlling weight to prior bargaining history, the Board is undermining the goal of a uniform policy on health care industry bargaining units; it is ignoring the Congressional admonition concerning health care unit proliferation; and it is ignoring its own guideline bargaining unit decisions. In so doing, the Board's action oversteps the law, the national labor policy and Congress' indicated intent with respect to the health care institutions.

AHA submits that the Board and Court below improperly disregarded Congressional intent to prevent unit proliferation by certifying a unit consisting solely of technical employees excluding licensed practical nurses. The consequence of this action will be the sanctioning of additional exceptions to the Congressional admonition and guideline decisions, thereby fostering the proliferation of bargaining units.

For all of the above reasons, as well as for the reasons set forth by the Petitioner in its brief, AHA respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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